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In the
Supreme Court of the United States

OCTOBER TERM, 1986

U.A. 198 HEALTH & WELFARE,
EDUCATION & PENSION FUNDS,
Petitioners,

VERSUS

RESTER REFRIGERATION SERVICE, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Does §§502 and 515 of ERISA, 29 U.S.C. §§1132 and 1145 confer jurisdiction upon a federal district court of a multiemployer trust fund's suit for the recovery of fringe benefit contributions for that period of time following the expiration of a collective bargaining agreement but prior to impasse being reached during collective bargaining negotiations, consistent with an employer's underlying obligation to continue making such contributions pending impasse created by applicable federal labor laws.

TABLE OF CONTENTS

Question Presented.....i
Table of Contents.....ii
Table of Authorities.....iii
Opinions Below.....1
Jurisdiction.....2
Statutes Involved.....2
Statement of the Case.....2
Reasons for Granting the Writ.....6

I. ERISA CREATES A DIRECT CAUSE OF ACTION IN FEDERAL COURT TO COLLECT POST-CONTRACT EXPIRATION CONTRIBUTION DELINQUENCIES.....8

II. REQUIRING THE TRUSTEES OF MULTIEMPLOYER PLANS TO FILE CHARGES WITH THE NLRB HAS THE EFFECT OF DELEGATING THE TRUSTEES' FIDUCIARY DUTIES TO THE NLRB AND A SPONSORING UNION, AND PREVENTS THE TRUSTEES FROM SATISFYING THEIR STATUTORY FIDUCIARY OBLIGATIONS.....15

Conclusion.....20
Certificate.....21

APPENDIX A.....A-1
APPENDIX B.....B-1
APPENDIX C.....C-1
APPENDIX D.....D-1

TABLE OF AUTHORITIES

CASES	PAGE
Automobile Workers v. Russell, 356 U.S. 634, 642-643, 78 S.Ct. 932, 937, 2 L.Ed.2d 1030 (1958)	18
Campbell v. Wells Fargo Bank, 781 F.2d 440, 442 (5th Cir. 1986)	14
Carpenters Local Union No. 1846 v. Pratt-Farnsworth, 690 F.2d 489 (5th Cir. 1982)	13
Central States Pension Fund v. Central Transport, Inc., 472 U.S. ____, 105 S.Ct. 2833, 2842 (1985)	7,8,16,17
Del Webb Co., 95 NLRB 377 (1951)	17
Donovan v. Bryans, 566 F.Supp. 1258, 1262 (E.D. PA. 1983)	7
FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 141-144, 60 S.Ct. 437, 440-442, 84 L.Ed. 656 (1940)	18
I.A.M. National Pension Fund v. Schulze Tool & Die Company, Inc., 564 F.Supp. 1285 (N.D. Cal. 1983)	11,13,14
Kaiser Steel Corp. v. Mullins, 454 U.S. 72, 88 (1982)	5,12.14
Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Company, Inc., 779 F.2d 490 (9th Cir. 1985)	6
Laborers Health and Welfare Trust Fund v. Hess, 594 F.Supp. 273 (N.D. Cal. 1984)	10,15
Laborers Health and Welfare Trust Fund v. Kaufman & Broad, 707 F.2d 412, 416 (9th Cir. 1983)	7,17
Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960)	7

TABLE OF AUTHORITIES (continued)

CASES PAGE

Miranda Fuel Co., 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2nd Cir. 1963).....13

Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Company, 605 F.Supp. 1431 (W.D. Mo. 1985).....4

Moldovan v. Great Atlantic and Pacific Tea Company, Inc., 790 F.2d 894 (3rd Cir. 1986).....6

NLRB v. Amax Coal Company, 453 U.S. 322, 329 (1981).....6,7,17

NLRB v. Haberman Construction Company, 641 F.2d 351, 357 (5th Cir. 1981) (en banc).....9

NLRB v. Katz, 369 U.S. 736 (1962).....9

NLRB v. Movie Star, Inc., 361 F.2d 346, 352 (5th Cir. 1964.....17

Office and Professional Employees Insurance Trust Fund v. Laborers Funds Administrative Office, Inc., 783 F.2d 919 (9th Cir. 1986).....6

Pension Benefit Guaranty Corporation v. R.A. Gray & Company, 467 U.S. 717 (1984).....8

Republic Steel Corp. v. NLRB, 311 U.S. 7, 10-12 (1940).....18

Rosen v. Hotel and Restaurant Employees, 637 F.2d 592, 600 (3rd Cir. 1980), *cert. den.* 454 U.S. 898.....6,16

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959).....5,13

Schneider Moving & Storage Company v. Robbins, 104 S.Ct. 1844 (1984).....15,16,17,19

Shepard v. NLRB, 459 U.S. 344, 351-352 (1983).....18

Smith v. Evening News Assoc., 371 U.S. 195 (1962).....13,

TABLE OF AUTHORITIES (continued)

CASES PAGE

Teamsters v. Morton, 377 U.S. 252 (1964).....13

Texas industries v. NLRB, 336 F.2d 128, 134 (5th Cir. 1964).....17

U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc., 790 F.2d 423 (5th Cir. 1986).....passim

U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc., 612 F.Supp. 1033 (M.D. La. 1985).....1,2,3

Vaca v. Sipes, 386 U.S. 171, 179 (1967).....13,16

Wisconsin Dept. of Ind., Lab. and H.R. v. Gould, Inc., 475 U.S. ____. 106 S.Ct. 1051, 1062 n.5 (1986).....18

Woodward Sand Co., Inc. v. Western Conf. of Teamsters Pens. F. 789 F.2d 691 (9th Cir. 1986).....13,14

STATUTES

Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§1001-1461

Section 2(b), 29 U.S.C. §1001(b).....6

Section 404(a)(1), 29 U.S.C. §1104(a)(1).....6

Section 502, 29 U.S.C. §1132.....2,3,4,10,13

Section 502(g). 29 U.S.C. §1132(g).....15

Section 502(g)(2), 29 U.S.C. §1132(g)(2).....7,8

Section 515, 29 U.S.C. §1145.....2-8,10,14,15

Section 4201 (B)(2), 29 U.S.C. §1381.....2

Section 4203, 29 U.S.C. §1383.....2

Section 4212(a), 29 U.S.C. §1392(a).....4-6,8,10,11

Section 4212(a), 29 U.S.C. §1392(a).....4-6,8,10,11

TABLE OF AUTHORITIES (continued)

STATUTES	PAGE
Section 4212(a), 29 U.S.C. §1392	2,11
Section 4221(d), 29 U.S.C. §1401	2
Section 4301, 29 U.S.C. §1451	2
Labor Management Relations Act of 1947, as amended	
Section 301, 29 U.S.C. §185	1,3,7,13
Section 302, 29 U.S.C. §186	1,2,14,15
Section 302(c)(5), 29 U.S.C. §186(c)(5)	1,2,14,15
Section 303, 29 U.S.C. §187	1,13
Multiemployer Pension Plan Amendments Act of 1980, Publ L. No. 96-364, 94 Stat. 1208	2
Section 3, 29 U.S.C. §1001a	2
Section 104(2), 29 U.S.C. §1132 (g)(2)	2
Section 306, 29 U.S.C. §1132(b)(2)	2
National Labor Relations Act, as amended	
Section 3(d), 29 U.S.C. §153(d)	17
Section 7, 29 U.S.C. §157	5,13
Section 8(a)(5), 29 U.S.C. §158(a)(5)	4,5,9,10,13-15
Section 8(b)(1)(A), 29 U.S.C. §185(b)(1)(A)	13
Section 8(b)(4), 29 U.S.C. §158(b)(4)	13
Section 8(e), 29 U.S.C. §158(e)	13
Section 10(c), 29 U.S.C. §160(c)	18
Section 10(e), 29 U.S.C. §160(e)	18
Section 10(f), 29 U.S.C. §160(f)	18
28 U.S.C. §1254(1)	2
28 U.S.C. §2101(c)	2

TABLE OF AUTHORITIES (continued)

STATUTES PAGE

Legislative Materials

H.R. Rep. No. 869 (Part I), 96th Cong., 2d Sess. (1980). Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration (Comm. Print 1980).....9

126 Cong.Rec. 23039 (1980).....7,9

126 Cong. Rec. 23288 (1980).....7,9

Administrative Materials

29 C.F.R. §101.2.....16

29 C.F.R. §101.4.....16

29 C.F.R. §101.9(c).....18

Miscellaneous

NLRB Casehandling Manual (Part One) Unfair Labor Practice Proceedings, §11770.....17

IN THE
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U.A. 198 HEALTH & WELFARE,
EDUCATION & PENSION FUNDS,
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VERSUS

RESTER REFRIGERATION SERVICE, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPELAS –
FOR THE FIFTH CIRCUIT

United Association 198 Health and Welfare, Education and Pension Funds (hereinafter the "Funds"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 23, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix A, infra) is reported at 790 F.2d 423. The order of the United States District Court for the Middle District of Louisiana (Appendix B, infra) was filed on July 3, 1985, entered on July 8, 1985, and is reported at 612 F.Supp 1033.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit was entered on May 23, 1986. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1). This petition is timely filed with the court under 28 U.S.C. §2101(c).

STATUTES INVOLVED

The relevant statutory provisions are:

A. The National Labor Relations Act, as amended, §7 and 8, 29 U.S.C. §157 and 158.

B. The Labor Management Relations Act of 1947 as amended, §§301, 302 and 303, 29 U.S.C. §§185, 186 and 187.

C. The Employee Retirement Income Security Act of 1974, as amended, §§502, 515, 4201, 4203, 4212, 4221 and 4301, 29 U.S.C. §§1132, 1145, 1381, 1383, 1392, 1401 and 1451.

D. The Multiemployer Pension Plan Amendments Act of 1980, §§3, 306 and 104(2), 29 U.S.C. §§1001(a), 1132(b)(2), 1132(g)(2), 1145 and 1381-1452.

Pertinent portions of these statutory provisions are reproduced at appendix D, infra.

STATEMENT OF THE CASE

The UA 198 Health and Welfare, Education and Pension Funds are multiemployer employee benefits plans established in accordance with §302(c)(5) of the Labor

Management Relations Act of 1947, as amended, (hereinafter "LMRA"), 29 U.S.C. §186(c)(5) and the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), 29 U.S.C. §§1001-1461, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter "MPPAA") Pub. L. No. 96-364, 94 Stat. 1208. The Funds were established by collective bargaining agreements between United Association Local 198, a Baton Rouge, Louisiana, based union representing plumbers & pipe fitters in collective bargaining, and various commercial and industrial plumbing and pipefitting contractors. The Funds are jointly administered union-management trust funds, established pursuant to the LMRA, 29 U.S.C. §186(c)(5).

Rester Refrigeration Service, Inc. (hereinafter "Rester"), is a Baton Rouge based employer which was signatory to collective bargaining agreements with United Association Local 198, the most recent of which was effective by its terms from May 1, 1981, through April 30, 1984. The agreement required, inter alia, that Rester submit periodic contributions to the Funds on behalf of covered plumber employees. Rester ceased contributing to the Funds when the bargaining agreement expired on April 30, 1984, contending that it had reached impasse in its contract negotiations with United Association Local 198 as of that date. Rester thereafter continued to engage in collective bargaining with Local 198 but made no contributions to the Funds, although the Funds contended that a bargaining impasse had not been reached with Local 198.

On April 2, 1985, the Funds instituted this action in the Middle District of Louisiana, seeking to recover delinquent contibutions commencing with the date that Rester

ceased making such contributions (April 30, 1984) until impasse was reached. The Funds contended that the basis for federal jurisdiction in the district court was founded on §§502 and 515 of ERISA, as amended, 29 U.S.C. §§1132 and 1145.[1]

The district court, relying primarily upon *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Company,* 605 F.Supp. 1431 (W.D. Mo. 1985), found that §§502 and 515 of ERISA did not confer jurisdiction upon the district courts, and granted Rester's motion for summary judgment. The court reasoned that when a collective bargaining agreement expires, the employer's obligation to preserve the status quo with respect to the conditions contained therein arises not under the terms of the agreement but under §8(a)(5) of the NLRA, 29 U.S.C. §158(a)(5). The court concluded that the National Labor Relations Board (hereinafter "NLRB") is "vested with exclusive jurisdiction over alleged employer unfair labor practices arising by reason of failure to make welfare benefit contributions following expiration of collective bargaining agreements." 612 F.Supp. at 1038. The court further concluded that §4212(a) of ERISA, 29 U.S.C. §1392(a), which defines the term "obligation to contribute" to include obligations arising "as a result of a duty under applicable labor-management relations law," is limited to Part 1 of Subtitle E Subchapter III and is not applicable to actions brought under §§502 and 515 of ERISA, which are contained in Part 5 of Subtitle E of Subchapter III of ERISA. 612

[1] In their complaint, the Funds also alleged the Court had jurisdiction under §301(a) of the LMRA, 29 U.S.C. §185(a). The district court found to the contrary, however. 612 F.Supp. at 1036. The Funds abandoned this position before the Fifth Circuit, and the issue is not before this Court.

F.Supp. at 1037-1038.[2]

In affirming the district court, the Fifth Circuit similarly concluded that §4212 of the ERISA does not apply to actions brought under §515. It reasoned that the NLRB, rather than the federal courts, has jurisdiction over activity which is arguably subject to §§7 or 8 of the NLRB, and that the courts are required to defer to the exclusive competence of the NLRB when such conduct is the subject of a collection action.[3] Rejecting that §515 read in conjunction with §4212 establishes an exception to the NLRB's primary jurisdiction, the court stated that "Congress was aware of the fact that obligations to contribute to employee trust funds arise under labor law as well as under collective bargaining agreements. Had Congress intended to cover both classes of obligations in §515, the most natural and effective way to express that intent would have been to duplicate the language of §4212 in §515. That Congress did not do so indicates that it did not intend §515 to apply obligations created by the labor statutes." 790 F.2d at 426. Finding neither "plain language in the statute or

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[2] Section 515 of ERISA provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Section 4212(a) defines the "obligation to contribute" as:

> an obligation ... arising (1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law.

[3] The Fifth Circuit relied upon *Kaiser Steel Corp. v. Mullins*, 454 U.S. 72, 83 (1982), quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

compelling reasons in the legislative history to depart from the primary jurisdiction accorded the NLRB," id. at 426, the court concluded that because the primary issue on the merits is whether the parties have reached impasse, the NLRB has exclusive jurisdiction over the dispute.[4] *id.*

REASONS FOR GRANTING THE WRIT

In 1974, Congress enacted ERISA with the stated policy consideration of protecting "the interest of participants in employee benefit plans and their beneficiaries, ... by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." Section 2(b) of ERISA, 29 U.S.C. §1001(b). A trustee bears an unwaivering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. *NLRB v. Amax Coal Company,* 453 U.S. 322, 329 (1981); §404(a)(1) of ERISA, 29 U.S.C. §1104(a)(1). One Circuit Court of Appeals has held that so great is the trustees' fiduciary duty to the funds' participants and beneficiaries that they are required to "take action against employers who fail to contribute to the Fund as required by the plan." *Rosen v. Hotel and Restaurant Employees,* 637 F.2d 592, 600 (3rd

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[4] The Ninth Circuit, in *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Company, Inc.,* 779 F.2d 490 (9th Cir. 1985) and *Office and Professional Employees Insurance Trust Fund v. Laborers Funds Administrative Office, Inc.* 783 F.2d 919 (9th Cir. 1986) and the Third Circuit in *Moldovan v. Great Atlantic and Pacific Tea Company, Inc.* 790 F.2d 894 (3rd Cir. 1986), have reached the same result as the Fifth Circuit. The Fifth Circuit cited the Ninth Circuit decisions. *Advanced Lightweight* is currently before this court on a petition for writ of certiorari to the Ninth Circuit, No. 85-2079.

Cir. 1980), *cert. den.* 454 U.S. 898.[5] Section 515 of ERISA was enacted to provide a direct, unambiguous, and efficacious ERISA cause of action to a fund against a deliquent employer under ERISA, 126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson); *id.* at 23288 (remarks of Sen. Williams), in addition to any existing cause of action under §301 of the LMRA.[6]

By requiring the trustees of an employee benefit fund to file charges with the NLRB in situations where an employer raises impasse as a defense to a collection action, the Fifth Circuit has effectively impaired the trustees' ability to fulfill their fiduciary duties, both as defined by

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[5] The Third Circuit noted that the obligation to take action "could require the trustees to commerce suit, or to picket the non-contributing employers; but some action must be taken to safeguard beneficiaries' credited service." 637 F.2d at 600, relying upon the Restatement (Second) of Trusts §173, Comment b, (1959). In *Laborers Health and Welfare Trust Fund v. Kaufman & Broad*, 707 F.2d 412, 416 (9th Cir. 1983), the Ninth Circuit did not adopt the broad rule enunciated in *Rosen*, but noted "that at some point, failure to attempt to collect pension contributions may result in a breach of the trustee's statutory fiduciary duty of care and diligence in administering the plan." See also, *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. ____, 105 S.Ct. 2833, 2842 (1985) ("in the Department [of Labor's] view, plans 'which do not establish and implement [such] collection procedures' may 'by failing to collect delinquent contributions' be found to have violated §406's prohibition of extensions of credit to employers," quoting Prohibited Transactions Exemption 76-1, 41 Fed. Reg. 12740, 12741 (1976)). See also, *Donovan v. Bryans*, 566 F.Supp. 1258, 1262 (E.D. PA. 1983) (failure to make reasonable efforts to collect on delinquent loans held to be breach of fiduciary duty.).

[6] Actions to recover delinquent contributions were brought under §301 prior to ERISA. See, *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960). To enhance the effectiveness of direct actions under ERISA and to protect the resources of trust funds, Congress in 1980 added §502(g)(2), 29 U.S.C. 1132(g)(2), which provides for mandatory awards of interest, liquidated damages and attorney's fees to a prevailing fund in actions to enforce §515, the recovery of delinquent contributions.

ERISA and the common law.[7] Rather than direct actions in federal court which may expeditously resolve the matter of delinquent contributions, and consequently, continue to preserve the financial integrity and well-being of the Fund, through the use of the full panoply of ERISA remedies, trustees are relegated to the time consuming procedures of the NLRB with its limited remedies. The Funds submit that this was not the intent of Congress, that the "prompt fulfillment of [an employer's] contribution obligations"[8] is a substantial federal question impacting upon thousands of employee benefit plans across the country, and is an issue of such importance as to warrant resolution by this court.

I. ERISA CREATES A DIRECT CAUSE OF ACTION IN FEDERAL COURT TO COLLECT POST-CONTRACT EXPIRATION CONTRIBUTION DELINQUENCIES.

In 1980, Congress enacted MPPAA, which, inter alia, added §§502(g)(2) and 515 of ERISA.[9] Representative Thompson and Senator Williams, the sponsors of the legislation, explained the purpose of §515 as follows:

> Recourse available under current law for collecting

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[7] In *NLRB v. Amax Coal*, 453 U.S. at 329-332, the court concluded that Congress contended to impose on trustees traditional fiduciary duties as they have arisen under the common law of trust.

[8] *Central Transport*, 105 S.Ct. at 2842.

[9] MPPAA also established "withdrawal liability" provisions for an employer withdrawing from a multiemployer pension plan where that plan has a substantial "unfunded vested benefit." See, *Pension Benefit Guaranty Corporation v. R.A. Gray & Company*, 467 U.S. 717 (1984). Included in MPPAA §4212(a) of ERISA, 29 U.S.C. §1392(a), which defines an employer's "obligation to contribute."

> delinquent contributions is insufficient and unnecessarily costly. Some simple collection actions brought by plan trustees have been converted into lenghty, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plan's entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law (other than 29 U.S.C. 186). Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises ... **[T]his legislation is intended to clarify the law ... by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer.**
> (emphasis added).

126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson); *id.* at 23288 (remarks of Sen. Williams).[10] Representative

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[10] The Committee Print differs from the comments reported by the Congressional Record but clearly establishes that Congress intended delinquency actions to be expeditious:

> The Public Policy of this legislation to foster the preservation of the private multiemployer plan system mandates that provision be made to discourage delinquencies and simplify delinquency collection ... a plan sponsor that prevails in any action to collect delinquent contributions will be entitled to recover the dleinquent contributions, court costs, attorney's fees, and double interest on the contributions owed. **The intent of this section is to promote the prompt payment of contributions and asset plans in recovering the costs incurred in connection with delinquencies.** (emphasis supplied). *Staff of Senate Comm. on Labor and Human Resources*, 96 Cong., 2nd Sess., S. 1076, the Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 43-44 (Comm. Print 1980).

Thompson and Senator Williams also noted that "[t]he bill imposes a Federal statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans." 126 Cong.Rec. 23039 (Rep. Thompson); *id.* at 23288 (Sen. Williams).[11]

In *Laborers Health and Welfare Trust Fund v. Hess,* 594 F.Supp. 273 (N.D. Cal. 1984), the court held, consistent with the legislative history, that the phrase "obligated to make contributions" which appears in §515 includes an obligation to contribute arising as a result of §8(a)(5) of the NLRA, 29 U.S.C. §158(a)(5); that is, the employer's duty to preserve the status quo after the expiration of a collective bargaining includes the duty to make contributions to employee benefit funds consistent with the terms of the expired collective bargaining agreement until such time as the union and the employer reach a bargaining impasse. The *Hess* court found that as §502 was the vehicle by which a fund enforces §515, an employer's failure to make contributions after expiration of the agreement was actionable under §502. 594 F.Supp. at 282. This is the position the Funds advance before this court.

The *Hess* court reached its conclusion based on the definition of "obligation to contribute" set forth at §4212(a) of ERISA, 29 U.S.C. §1392(a) and the court's conclusion that this definition should be read into §515. The court stated:

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[11] One such obligation to contribute arises under §8(a)(5) of the NLRA. An employer, after expiration of a collective bargaining, must continue to comply with the terms and conditions of employment contained in the expired agreement until a collective bargaining impasse is reached. *NLRB V. Katz,* 369 U.S. 736 (1962); *NLRB v. Haberman Construction Company,* 641 F. 2d 351, 357 (5th Cir. 1981) (en banc).

"It is true that the definition of obligation to contribute in section 1392 states that the definition is '[f]or purposes of this part,' evidently referring to Part 1 -- 'Employer Withdrawals,' which is only one of three parts of Subtitle E, 'Special Provisions for Multiemployer Plans...'" *Schulze*, 565 F. Supp. at 1294 n.4[12] "No other definition of obligation to contribute is found anywhere in ERISA, however. There is no reason to believe that Congress intended to create any discontinuity between the employer withdrawal part of the Act and the other contexts in which the question of obligation to contribute might arise." *Id.* Thus, it makes sense to apply the definition of section 1392 when interpreting the phrase "obligated to make contributions" in section 515.

594 F. Supp. at 279 N.7.

The Fifth Circuit "decline[d] to engraft the definition

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12 *I.A.M. National Pension Fund v. Schulze Tool & Die Company, Inc.*, 564 F. Supp. 1285 (N.D. Cal. 1983). In *Schulze*, a pension fund was seeking to assess withdrawal liability against an employer. The employer had made contributions to the trust fund after the expiration of the collective bargaining agreement, but ceased at a point during negotiations with the union; it claimed that impasse had been reached, and it no longer had a duty to make such contributions. The *Schulze* court concluded that the phrase "obligation to continue arising ... as a result of a duty under applicable labor-management relations law" contained in §4212(a)(2) incorporated the impasse concept developed under the NLRA. *id.* at 1296. The court further concluded that it was necessary to resolve the impasse issue to establish whether the employer's obligation to contribute had ceased and thus, the date of the employer's withdrawal from the Fund. *id.* The *Schulze* court proceeded to resolve the impasse issue.

of §4212 onto §515," 790 F. 2d at 426, reasoning that had Congress intended to cover obligations to contribute that arise under labor law as well as under collective bargaining agreements, "the most natural and effective way to express that intent would have been to duplicate the language of §4212 in §515. That Congress did not do so indicates that it did not intend §515 to apply to obligations created by the labor statutes." *id.*

In so holding, the Fifth Circuit accorded no weight to the legislative history, *id.* 790 F.2d at 426 n.17, and essentially concluded that Congress intended to create a discontinuity between the employer withdrawal part of the Act and other contexts in which the question of obligation to contribute might arise. It thus relegated to the NLRA situations in which an employer raises a defense related to the NLRA. But Congress' concern was to eliminate collateral defenses which were wholly unrelated to the employer's promise to pay and the plan's entitlement to receive contributions, *Kaiser Steel Corp. v. Mullins,* 454 U.S. 72, 88 (1982) ("[Sen. Williams and Rep. Thompson] did not say that employers should be prevented from raising all defenses;" rather they spoke in terms of 'unrelated' and 'extraneous defenses'" (footnote omitted)). Implicitly, defenses which are directly related to the obligation to contribute were intended to be heard by the district court.

In *Kaiser Steel Corp.*, the Court gave an expansive reading to §515, reasoning that to limit an employer's defenses to those arising under §302(a) of the LMRA, 29 U.S.C. §186, would be to assume that "Congress implicitly repealed the anti-trust laws, the labor laws, and any other statute which might be raised as a defense to a provision in a collective bargaining agreement requiring an

employer to contribute to a pension fund." *id.* at 88. Accordingly, the Court found that a district court may properly consider an employer's defense which alleges a violation of §8(e) of the NLRA, notwithstanding the fact that pursuant to the teachings of *Garmon, supra,* the NLRB has exclusive jurisdiction over matters arising under §§7 and 8 of the NLRA.[13]

In the district court, the Funds sought to enforce Restser's promise to pay fringe benefit contributions pursuant to the written terms of the collective bargaining agreement. It was Rester which raised the defense of impasse and the right to unilaterally change terms and conditions of its employees' employment. It was Rester, not the trust Funds, which raised the specter of §8(a)(5). Although

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[13] There are now many exceptions to the *Garmon* preemption doctrine. In *Woodward Sand Co., Inc. v. Western Conf. of Teamsters Pens. F.*, 789 F. 2d 691 (9th Cir. 1986), the Ninth Circuit resolved the question of whether an employer had reached impasse in its collective bargaining negotiations with a union; the court reasoned that it was necessary to do so, and that Congress authorized the Courts to do so, to determine when an employer's obligation to contribute to a fund ceased for withdrawal liability purposes. Accord: *Schulze, supra.* In *Carpenters Local Union No. 1846 v. Pratt-Farnsworth,* 690 F.2d 489 (5th Cir. 1982), the Fifth Circuit held that an action brought under §502 of ERISA could be maintained against employers alleged to be "alter egos" or "single employers," in addition to actions under §301 of the LMRA, for conduct which arguable was violative of §8(a)(5) of the NLRA as well as a breach of contract. Section 303 of the LMRA, 29 U.S.C. §187, confers jurisdiction on the federal courts to decide whether §8(b)(4) of the NLRA, 29 U.S.C. §158(b)(4), has been breached, and to assess damages. See, *Teamsters v. Morton,* 377 U.S. 252 (1964). A federal court may also decide whether a union has violated its duty of fair representation to an employee it represents, although the NLRB finds such breaches to be violative of §8(b)(1)(A) of the NLRA. See, *Smith v. Evening News Assoc.,* 371 U.S. 195 (1962); *Vaca v. Sipes,* 386 U.S. 171, 179 (1967) ("[The *Garmon*] preemption doctrine, however, has never been rigidly applied where it would not be fairly inferred that Congress intended exclusive jurisdiction to lie with the NLRB."); *Miranda Fuel Co.,* 140 NLRB 181 (1962), enf. denied 326 F. 2d 172 (2nd Cir. 1963).

Rester did not allege that this made the promise to pay illegal, cf., *Kaiser Steel Corp. v. Mullins, supra,* it was raising a defense which was squarely within the parameter of issues which may be decided by the federal district courts. See, *Woodward Sand, supra; Schulze, supra.*

Although a general rule of statutory construction is that "where Congress has carefully employed a term in one place but excluded it in another, it should be excluded ... [t]his rule of exclusion, however, is only an aid to statutory construction, not a rule of law. The controlling consideration is legislative intent, and the maxim can be overcome by a strong indication of contrary congressional intent." (citations omitted). *Campbell v. Wells Fargo Bank,* 781 F.2d 440, 442 (5th Cir. 1986). Congressional intent is overwhelming. Congress meant to include the obligation to contribute under federal labor relations law within the ambit of §515. The Fifth Circuit erred in refusing to consider the body of legislative history.

One final consideration worthy of the court's attention is that §302(c)(5) of the LMRA, 29 U.S.C. §186(c)(5) requires that where a union and an employer have created an employee benefit fund which is funded in whole or in part by employer contributions, "the detailed basis on which such payments are to be made" must be "specified in a written agreement with the employer." Where the collective bargaining agreement has expired a trust fund may still accept contributions because the expired agreement (as well as the trust documents) set forth the detailed basis on which contributions are to be made. Similarly, §515 dictates that "[e]very employer who is obligated to make contributions ... *under the terms* of a collectively bargained agreement shall ... make such contributions," (emphasis

added), rather than mandating the payment of contributions **under a collective bargaining agreement.**" The implication arises that the phrase "under the terms of a collectively bargained agreement" was intended to include obligations arising not only as a result of §8(a)(5) of the NLRA, *Hess*, 594 F. Supp. at 279, but also was intended to comport with §302(c)(5)'s requirement that the terms of the agreement to contribute be set forth in a written agreement.

II. REQUIRING THE TRUSTEES OF MULTIEMPLOYER PLANS TO FILE CHARGES WITH THE NLRB HAS THE EFFECT OF DELEGATING THE TRUSTEES' FIDUCIARY DUTIES TO THE NLRB AND A SPONSORING UNION, AND PREVENTS THE TRUSTEES FROM SATISFYING THEIR STATUTORY FIDUCIARY OBLIGATIONS.

Section 502 creates a direct action for trustees to collect delinquent contributions, enforcing §515. Section 502(g) sets forth a broad range of remedies -- liquidated damages, interests, and attorney's fees. In bringing a federal court action, the trustees, as is true with any plaintiff, have complete and total discretion over the course of the proceedings including implicity, the right to compromise the claims should circumstances warrant, and if it is consistent with the trustees' duty to preserve the integrity of the fund. Indeed, preserving the integrity of the fund is at the heart of the trustees' fiduciary duty and this Court has emphatically held that a trustee may not delegate his fiduciary duties to either the union, *Schneider*

Moving & Storage Company v. Robbins, 104 S. Ct 1844 (1984)[14] or to federal government agencies. *Central Transport,* 105 S.Ct. at 2844 (although ERISA grants the Secretary of Labor broad investigating powers,... neither the structure of the Act nor the legislative history show any congressional intent that plans should rely primarily on centralized federal monitoring of employer contribution requirements." (citation omitted.)).

Investigation, prosecution and enforcement with respect to unfair labor practices is entirely within the control of the General Counsel of the NLRB. See, 29 U.S.C. §153 (d); 29 CFR §§101.2, 101.4. Trustees would have no control over the decision to issue the complaint or the discovery and other litigation decisions involved. Thus, enforcement of §515 would be delegated to the General Counsel, who has no fiduciary duties under ERISA, and whose discretion in the issuance of unfair labor practice

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[14] In *Robbins,* the Court refused to require trust funds to exhaust the grievance procedure contained in the collective bargaining agreement, reasoning that "each of the participating unions and employers has an interest in the prompt collection of the proper contributions from each employer." *id.* at 1850. The Court also noted that because only the union or the employer may invoke the arbitration process, "[i]f the union disagreed with the trustees' construction of the agreement, it could refuse to arbitrate the claim or compromise the trustees' position in arbitration. The outcome of any subsequent judicial proceeding could be predetermined by the outcome of arbitration."*id.* at 1851. The Court further noted that the union may differ from the trustees' interest:

> if there were a duty of fair representation here, it would accord the union wide discretion and would provide only limited protection to trust beneficiaries. A primary union objective is "to maximize overall compensation of its members."'... Thus, it may sacrifice particular elements of the compensation package "if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole." (citation omitted). *id.* at 1851, n.22.

complaints is subject to very few limitations and is unreviewable, see, *Vaca*, 386 U.S. at 182. Cf., *Robbins, supra*, where the court refused to place the trustees at the mercy of the union's discretion to invoke arbitration procedures, because of the union's conflicting interest in seeking arbitration and the possibility claims would be compromised without benefit to the fund.

Further, the trustees would be relying on the union with which the employer allegedly reached impasse to cooperate with the NLRB, and to present the necessary evidence to convince the General Counsel to issue a complaint. In the absence of such cooperation, the trustees would be without recourse before the NLRB, and this would have the effect of undermining a federal court suit. However, in contrast, the trustees have the power of subpoena in federal court, and may use the subpoena power to obtain the evidence that a union may have. The fact that a union may participate as a plan sponsor is no guarantee of voluntary cooperation with trustees. As cited precedent demonstrates, the trustees have a fiduciary duty to plan participants and beneficiaries separate from the union. *Amax Coal, supra.* Although the union may not wish to pursue the issue of whether the union and an employer have reached impasse, the trustees must, according to the dictates of one circuit court of appeals and the intimation of another,[15] pursue the issue, and federal court discovery devices allow trustees access to information denied to them by the procedures of the NLRB.[16]

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[15] *Rosen*, 637 F.2d at 600; *Kaufman & Broad*, 707 F.2d at 416. See also, *Central Transport*, 105 S.Ct. at 2841.

[16] The discovery provisions of the Federal Rules of Civil Procedure have been held to be not applicable to NLRB proceedings. *Texas Industries v. NLRB*, 336 F.2d 128, 134 (5th Cir. 1964); *NLRB v. Movie Star, Inc.*, 361 F.2d 346, 352 (5th Cir. 1964); *Del Webb Co.*, 95 NLRB 377 (1951). The NLRB does not issue investigative subpoenas to parties other than to the General Counsel during pre-complaint investigations. NLRB Casehandling Manual (Part One) Unfair Labor Practice Proceedings, §11770.

Assuming that the General Counsel decides to issue complaint, litigation before the NLRB is time consuming, and it may be years before the NLRB issues a decision on whether an employer and the union have reached impasse. From there, the employer would have the right to seek review of the Board's order in the circuit courts of appeal,[17] another time consuming procedure. Assuming the Board were to prevail before the circuit court, and have its order enforced,[18] the remedy obtained would still not comport with remedies provided by ERISA.[19] The Board cannot assess punitive damages, [20] its interest rates may be pegged to a standard that provides lower interest than that provided in the trust agreement, and makes no award of attorney's fees to a prevailing charging party. Also, the NLRB may be willing to compromise the claim for an amount significantly less than that which the trustees may be willing to agree. Although the trustees may oppose the settlement, the General Counsel has the discretion to

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[17] §10(f) of the NLRA, 29 U.S.C. §160(f).

[18] §10(e) of the NLRA, 29 U.S.C. §160(e).

[19] "The Board is not a court; it is not even a labor court; it is an administrative agency charged by Congress with the enforcement and administration of the federal labor laws. While a prayer for "complete relief" might find a receptive ear in a court of general jurisdiction, it is well settled that there are wide differences between administrative agencies and courts. See, e.g., *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141-144, 60 S.Ct. 437, 440-442, 84 L.Ed. 656 (1940). This Court has said that the Board's 'power to order affirmative relief under §10(c) is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices. Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct.' *Automobile Workers v. Russell*, 356 U.S. 634, 642-643, 78 S.Ct. 932, 937, 2 L.Ed.2d 1030 (1958)."
Shepard v. NLRB, 459 U.S. 344, 351-352 (1983).

[20] *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940); *Wisconsin Dept. of Ind., Lab. and H.R. v. Gould, Inc.*, 475 U.S.____. 106 S.Ct. 1051, 1062 n.5 (1986).

unilaterally enter into such a settlement agreement with an employer.[21]

It is conceivable that the trust funds may simulaneously file a charge with the NLRB and a suit in federal district court, and request that the court stay the proceeding pending the outcome of proceedings before the NLRB in order to obtain whatever additional relief ERISA accords but the NLRA does not. But again, this is simply the further lengthening of a process that was intended by Congress to be expeditious. *Robbins,* 104 S.Ct. at 1850-1851.

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[21] 29 C.F.R. §101.9(c).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 19th day of August, 1986 served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid.

Louis L. Robein, Jr.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
APPENDIX A

U. A. 198 HEALTH & WELFARE, EDUCATION & PENSION FUNDS,
Plaintiff-Appellant,

v.

RESTER REFRIGERATION SERVICE, INC.,
Defendant-Appellee.

No. 85-3453

OPINION

Filed May 23, 1986

Before: John Minor Wisdom, Thomas M. Reavley, and Sam D. Johnson, Circuit Judges

Opinion by Judge John Minor Wisdom

Appeal from the United States District Court
for the Middle District of Louisiana
John V. Parker, Chief Judge, Presiding

SUMMARY

Labor/Pensions

Appeal from a district court holding that it lacked subject matter jurisdiction under the Employee Retirement Income Security Act of 1974 (ERISA) over a trust fund's attempt to collect from an employer unpaid contributions accruing after the expiration of a collective bargaining agreement. Affirmed.

Employee benefit trust funds (the Funds) were established under a collective bargaining agreement between a local union and various pipefitting and plumbing contractors, one of which was Rester Refrigeration, Inc. Rester stopped contributing to the funds when the collective bargaining agreement expired because its contract negotiations with the local union had reached an impasse. The

Funds dispute whether negotiations were at an impasse. The Funds sued in district court to recover contributions allegedly due after the agreement expired but before any impasse. Holding that it lacked subject matter jurisdiction, the district court dismissed the action.

[1] An employer must honor the terms of an expired collective bargaining agreement until a new one is reached or until negotiations offer no hope of reaching one. Failure to honor an expired agreement before impasse is an unfair labor practice under the National Labor Relations Act. [2] As a general rule, federal courts do not have jurisdiction over actions involving unfair labor practices, and they must defer to the exclusive competence of the National Labor Relations Board. [3] ERISA, however, provides an exception that permits trust funds to sue employers for certain unpaid contributions that they are obligated to make under the terms of a collective bargaining agreement. The issue presented here is whether ERISA authorizes suits for contributions accruing after a collective bargaining agreement has expired but before negotiations have come to an end. [4] Neither the language of the pertinent ERISA section [5] nor the legislative history provides convincing evidence that Congress intended that the federal courts take jurisdiction over obligations accruing after an agreement expires. [6] The key issue on the merits here is whether the parties had reached an impasse. Because of its specialized expertise, the National Labor Relations Board is particularly qualified to decide such a question. Because the Board has "primary jurisdiction" to decide this basic issue, the National Labor Relations Act preempts the Fund's ERISA action.

OPINION

JOHN MINOR WISDOM, Circuit Judge:

This appeal presents the question whether federal courts have subject matter jurisdiction over an action by a union trust fund, under the Employee Retirement Income Security Act of 1974 (ERISA), against the employer to collect unpaid contributions accruing after the expiration of a collective bargaining agreement.

We hold that the National Labor Relations Act preempts the fund's ERISA action. The National Labor Relations Board has "primary jurisdiction" to decide the basic issue.[1] The Court of Appeals for the Ninth Circuit has reached the same result in a similar case.[2]

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[1]We use the term "primary jurisdiction" in the sense in which the United States Supreme Court used it in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . . ." 359 U.S. at 245.

> In this opinion, the term 'primary jurisdiction' is used to refer to the various considerations articulated in Garmon and its progeny that militate in favor of pre-empting state-court jurisdiction over activity which is subject to the unfair labor practice jurisdiction of the federal Board. This use of the term should not be confused, with the doctrine of primary jurisdiction, which has been described by Professor Davis as follows:
>
> "The precise function of the doctrine of primary jurisdiction is to guide a court in determining whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court."
>
> "The doctrine of primary jurisdiction does not necessarily allocate power between courts and agencies, for it governs only the question whether court or agency will *initially* decide a particular issue, not the question whether court or agency will *finally* decide the issue."
>
> 3 K. Davis, Administrative Law Treatise § 19.01, p 3 (1958) (emphasis in original).
>
> While the considerations underlying Garmon are similar to those underlying the primary-jurisdiction doctrine, the consequences of the two doctrines are therefore different. Where applicable, the Garmon doctrine completely pre-empts state-court jurisdiction unless the Board determines that the disputed conduct is neither protected nor prohibited by the federal Act.

Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 199, n.29 (1978).

[2]*Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc.*, 779 F.2d 497 (9th Cir. 1985); *see also Office and Professional Employees Insurance Trust Fund v. Laborers Funds Administrative Office, Inc.*, 783 F.2d 919 (9th Cir. 1986).

I.

The plaintiffs, United Association Local 198 Health & Welfare, Education & Welfare Funds (Funds), are employee benefit trust funds established under collective bargaining agreements between Local Union 198, representing plumbers and pipefitters in the Baton Rouge area, and various pipefitting and plumbing contractors. Rester Refrigeration, Inc. was obligated to contribute to the Funds under a collective bargaining agreement between Local 198 and Associated Mechanical Contractors of Baton Rouge. Rester stopped contributing to the Funds when the agreement expired on April 30, 1984. Rester takes the position that its obligation to contribute ended on Apr.' 30 because its contract negotiations with Local 198 had reached an impasse on that date. The Funds dispute whether negotiations were at an impasse on April 30.

The Funds sued in district court to recover contributions allegedly due after the contract expired but before any impasse. The complaint alleges jurisdiction under § 301(a) of the Labor Management Relations Act,[3] and §§ 502 and 515 of ERISA.[4] The district court held that it lacked subject matter jurisdiction under either statute and dismissed the action.[5] On appeal, the Funds have abandoned their argument under § 301(a) of the Labor Management Relations Act.

II.

[1] An employer must honor the terms and conditions of an expired collective bargaining agreement until a new agreement is reached or until contract negotiations offer no hope of reaching an agreement.[6] Failure to honor an expired agreement before impasse is an unfair labor practice under §§ 8(a)(1) and (5) of the National Labor Relations Act (NLRA).[7] On the merits, therefore, this dis-

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[3]29 U.S.C. § 185(a).

[4]29 U.S.C. §§ 1132, 1145.

[5]*U. A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.*, 612 F. Supp. 1033 (M.D. La. 1985).

[6]*NLRB v. Katz*, 369 U.S. 736, 743 (1962).

[7]29 U.S.C. §§ 158(a)(1), (5). *NLRB v. Haberman Construction Co.*, 641 F.2d 351, 357 (5th Cir. 1981) (en banc).

pute will turn on whether negotiations between Rester and Local 198 had reached an impasse by April 30.

[2] Perhaps no principle of labor law is better established than that the Board should make the initial determination whether challenged action constitutes an unfair labor practice. "As a general rule, federal courts do not have jurisdiction over activity which 'is arguably subject to § 7 or § 8 of the [NLRA],' and they 'must defer to the exclusive competence of the National Labor Relations Board.' "[8]

Congress has, however, created exceptions to the general principle that the NLRA has primary jurisdiction over unfair labor practice claims. For example, parties may sue in federal court to enforce collective bargaining agreements under § 301(a) of the Labor Management Relations Act.[9] Because the Funds do not challenge the district court's holding that it lacks jurisdiction under § 301(a), we do not decide that question.[10]

[3] As an important exception, ERISA permits trust funds to sue employers for certain unpaid contributions to the fund. Section 515 of ERISA provides:

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[8]*Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982), *quoting San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

[9]Section 301(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

[10]The district court reasoned that failure to honor contract terms after the contract expires is not a violation of the contract cognizable under § 301(a). The employer's obligation to contribute to the Funds from the date the contract expires to the date of impasse is created by statute rather than by contract. The district court adopted the reasoning of *Cement Masons Health & Welfare Trust Fund v. Kirkwood-Bly, Inc.*, 520 F. Supp. 942 (N.D. Cal. 1981), *aff'd*, 692 F.2d 641 (9th Cir. 1982).

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.[11]

Section 502(a)(3) of ERISA authorizes civil actions in federal district court to collect unpaid contributions due under § 515.[12] The parties agree that ERISA authorizes union trust funds to sue in federal court for contributions accruing while the collective bargaining agreement remains in force. The Funds contend that the statute also authorizes suits for contributions accruing after the collective bargaining agreement has expired, because negotiations had not come to an end.

III.

[4] We find little guidance in the language or the legislative history of the Multiemployer Pension Plan Amendments Act of 1980.[13] Elsewhere in the Act, the "obligation to contribute" is defined as "an obligation . . . arising (1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law."[14] The statute provides no other definition. We decline to engraft the definition of § 4212 onto § 515. Section 515 applies to employers "obligated to make contributions . . . under the terms of a collectively bargained

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[11]29 U.S.C. § 1145.

[12]Section 502 provides in part:

> A civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3).

[13]Pub. L. 96-364, 94 Stat. 1295, 29 U.S.C. § 1001a et seq.

[14]ERISA § 4212, 29 U.S.C. § 1392(a). Section 4212 defines "obligation to contribute" "[f]or purposes of this part". Section 4212 therefore refers to Subchapter III, Subtitle E, Part I of ERISA, headed "Employer Withdrawals". Section 515 is located in Subchapter I, Subtitle B, Part 5 of the statute.

agreement." Congress was aware of the fact that obligations to contribute to employee trust funds arise under labor law as well as under collective bargaining agreements.[15] Had Congress intended to cover both classes of obligations in § 515, the most natural and effective way to express that intent would have been to duplicate the language of § 4212 in § 515. That Congress did not do so indicates that it did not intend § 515 to apply to obligations created by the labor statutes.

[5] Congress enacted § 515 because "simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions.[16] We find in the legislative history no convincing evidence that Congress considered the application of § 515 to obligations accruing after an agreement expires.[17]

[6] We would require plain language in the statute or compelling reasons in the legislative history to depart from the primary jurisdiction accorded the NLRB. The key issue on the merits is whether the parties have reached an impasse. To resolve this issue, the fact-finder must consider a variety of factors such as the bargaining history, the importance of the issue or issues on which the parties disagree, a number of meetings between the parties, the length of the meetings, and the amount of time elapsed since negotiations

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[15]29 U.S.C. § 1392(a).

[16]Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S 1076—The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 44 (Comm. Print 1980); *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 87 (1982).

[17]Both sponsors of the bill stated that it "imposes a Federal statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans". 126 Cong. Rec. 23039 (statement of Rep. Thompson); *id.* at 23288 (statement of Sen. Williams). The Committee Print states that § 515 is intended to prevent "complex litigation concerning claims and defenses unrelated to the employer's promise and the Plan's entitlement to the contributions." Senate Comm. on Labor and Human Resources, 96th Cong., 2nd Sess. at 44 (Comm. Print 1980). The statements in the Congressional Record, taken alone, might be viewed as supporting the Fund's position. The statement in the Committee Print, taken alone, might be viewed as supporting the employer's position. We decline to attach great significance to either statement.

began.[18] The outcome often turns on slight factual differences. Because of its specialized expertise, the Board is particularly qualified to decide such a question.

* * *

Our decision today does not foreclose the Funds from obtaining relief by filing an unfair labor practice charge with the Board.

The judgment of the district court is AFFIRMED without prejudice to the plaintiffs' right to assert its claim before the National Labor Relations Board and to take future appropriate action in the courts.

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[18] *See* R. Gorman, *Basic Text on Labor Law, Unionization and Collective Bargaining* 448 (1976).

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Filed
JUL 8, 1985

U.S. 198 HEALTH & WELFARE
EDUCATION AND PENSIONS FUNDS

CIVIL ACTION

VERSUS NO.85-319-A

RESTER REFRIGERATION
SERVICES, INC.

JUDGMENT

For the written reasons assigned and filed herein:

IT IS ORDERED ADJUDGED AND DECREED that defendant's motion to dismiss for lack of subject matter jurisdiction is hereby GRANTED, and plaintiff's suit is hereby DISMISSED.

Baton Rouge, Louisiana, July 8, 1985.

/s/ JACK PARKER
CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX C

U.A. 198 HEALTH & WELFARE, EDUCATION AND PENSIONS FUNDS

v.

RESTER REFRIGERATION SERVICE, INC.

Civ. A. NO. 85-319-A.

United States District Court, M.D. Louisiana.
July 3, 1985.

Louis L. Robein, Jr., Robert H. Urann, Gardner, Robein & Healey, Metairie, La., for plaintiff.

Charles W. Raymond, Daniel K. Rester, Camp, Carmouche, Barsh, Hunter, Gray, Hoffman & Gill, Baton Rouge, La., for defendant.

MEMORANDUM OPINION

JOHN V. PARKER, Chief Judge.

This case presents a pure question of statutory construction upon which the court's subject matter jurisdiction depends. This is an action instituted by the Funds to compel payment of employee fringe benefit contributions for a period of time following the expiration of a written collective bargaining agreement. Labor management law requires, under some circumstances, that the employer make no change in conditions of employment, including payment of such contributions, following expiration of the agreement. The issues to be resolved are whether the Labor Management Relations Act confers jurisdiction upon the district court to hear this dispute and whether the Employee Retirement Income Security Act of 1974 confers jurisdiction to hear the dispute even through the obligation to pay the fringe benefits arises not from the collective bargaining agreement, but from general labor-management law.

The defendant, Rester, has filed a motion to dismiss for lack of subject matter jurisdiction or alternatively a motion for summary judgment. Briefs have been filed by both sides. The facts are undisputed.

Rester was a signatory to a collective bargaining agreement dated May 1, 1981 between the Plumbers and Steamfitters Local Union No. 198 and Associated Mechanical Contractors of Baton Rouge which expired by its own terms on April 30, 1984. Rester made the contributions required by the contract during the term of its existence. It is undisputed that Rester ceased making contributions after April 30, 1984. Rester claims that it engaged in collective bargaining with Local 198 prior to the expiration of the agreement but that it notified the Local that "an impasse" had been reached and that it would not negotiate after the expiration of the agreement. The plaintiffs dispute the claim of "impasse" and there are disputed issues of fact as to that issue. That issue, however, does not influence the jurisdictional question.

The compiaint asserts jurisdiction under the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) and under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1145. Defendant aserts that the Employee Retirement Income Security Act of 1974 does not authorize suits in district court to enforce obligations that do not arise from contract and that the National Labor Relations Board has exclusive jurisdiction to determine whether Rester's cessation of fringe benefits amounts to an unfair labor practice.

[1-6] The jurisprudence is uniform that the duty to bargain collectively imposed by Section 8(a)(5) of the Labor

Management Relations Act, 29 U.S.C. § 158(a)(5), includes that of maintaining the status quo as to conditions of employment. *N.L.R.B. v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1982). Even after the expiration of a collective bargaining agreement, an employer must bargain with the union before making any unilaterial changes in those terms and conditions which are mandatory bargaining subjects under the Act, including contributions to health, welfare, and pension funds, *N.L.R.B. v. Sac Const. Co., Inc.*, 603 F.2d 1155 (5th Cir. 1979) and the employer must continue making those payments during such negotiations. *N.L.R.B. v. Haberman Construction Co.*, 641 F.2d 734 (9th Cir. 1981). See also, *Hinson v. N.L.R.B.* 428 F.2d 133 (8th CIr. 1970), noting that the obligation continues after expiration of the contract, "in limited form, *not by reason of the contract itself but because of the dictates of the policy embodied in the National Labor Relations Act.*" Id. at 138 (emphasis in original). It is clear that a refusal by the employer to make such contributions constitutes an unfair labor practice under the jurisdiction of the N.L.R.B., See e.g. *N.L.R.B. v. Haberman Construction Co.*, supra. Generally, the N.L.R.B. has exclusive jurisdiction over alleged unfair labor practices. See *San Diego Building Trades Council, Etc. v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), noting that it is essential to the administration of the Act that adjudication of such matters be left to the Board. The Congress has created an exception to such exclusive jurisdiction in the Board in Section 301(a) of the Act, 29 U.S.C. § 185(a) which provides that "Suits for violation of contracts between an employer and a lobor organization" may be brought in the district courts. Thus, the district court does have jurisdiction to enforce *contractual* employer obligations and a failure to pay fringe benefits as required by an existing contract can be an

unfair labor practice and also constitute a breach of the collective bargaining agreement. Under those circumstances the Board's authority is not exclusive and the district court has jurisdiction to resolve the contract dispute. *William E. Arnold Co. v. Carpenters District Council,* 417 U.S. 12, 94 S.Ct. 2069, 40 L.Ed.2d 620 (1974). By enacting Section 301(a) of the Act, the Congress deliberately chose to leave the enforcement of collective bargaining agreements to the usual processes of the law rather than the exclusive jurisdiction of the N.L.R.B. *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502, 82 S.Ct. 519, 7 L.Ed.2d 483 (1962).

[7] At least one circuit has concluded that Section 301(a) of the Labor Management Relations Act does not confer jurisdiction upon the district courts to entertain claims of alleged failure to pay fringe benefits due under the duty to bargain requirement of Section 8(a)(5) of the Labor Management Relations Act. *Cement Masons Health and Welfare, Etc. v. Kirkwood-Bly,* 520 F.Supp. 942 (N.D. Calf. 1981), aff'd 692 F.2d 641 (9th Cir. 1982) held that the obligation to make fringe benefit payments following expiration of the collective bargaining agreement arisis from the provisions of the Labor Management Relations Act, and not from the collective bargaining agreement, and that the N.L.R.B. had exclusive jurisdiction to entertain an alleged unfair labor practice. Plaintiffs seem to concede the correctness of that holding since they do not suggest to the contrary in brief. The result seems plain that a suit to enforce a statutory obligation is not a "suit for violation of a contract" and I conclude that the Fifth Circuit would follow the holding of the Ninth Circuit on that issue. Accordingly, the Labor Management Relations Act confers no subject matter jurisdiction upon this court to entertain this action.

Plaintiff's primary thrust is founded on Sections 502 and 515, 29 U.S.C. § 1132 and § 1145 of the Employee Retirement Income Security Act of 1974. Section 1145 provides:

> Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or *under the terms of a collectively bargained agreement* shall, to the extent not inconsistent with law, make such contributions *in accordance with the terms and conditions of such plan or such agreement.* (emphasis supplied)

29 U.S.C. § 1132 then confers jurisdiction upon the district court "to enforce any provisions of this subchapter or the terms of the plan."

Rester argues that the obligation to make "contributions," if any, arisis from the Labor Management Relations Act and not "under the terms of a collectively bargained agreement" and thus that the court lacks subject matter jurisdiction. Plaintiff's argue that the language of the statute, legislative history and national labor policy require that the statute be construed so as to vest juristiction over all claims for unpaid employer contributions in the district courts. Plaintiffs rely upon language in some judicial opinions, for example, *Peerless Roofing Co., Ltd. v. N.L.R.B.*, supra, at 736 where the court stated:

> [T]he collective bargaining agreement itself survives its expiration date for some purposes. During negotiations, the employer is required by Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1976), to maintain the status quo as to wages and working conditions, even following the expiration date of the agreement.

The language employed by the court must be read and understood against the factual background of the issues then before the court.

In *Peerless Roofing*, supra, the agreement had expired and the N.L.R.B. was attempting to require the employer to continue to pay trust fund benefits under the duty imposed by Section 8(a)(5) of the National Labor Relations Act. No provision of the agreement provided for continuing such payments; the duty was strictly statutory, not contractual. It is obviously impossible for any portion of a dead agreement to "survive." A collective bargaining agreement, just like any other ageement which has expired by its own terms is over—finished—it confers no rights and imposes no obligations upon anyone. The duty to maintain the status quo imposed by the provisions of the National Labor Relations Act is quite different from a contractual obligation and, with due deference to the Ninth Circuit, the Act does not provide for "survival" of the agreement; it simply prevents unilateral changes during the bargaining process and is a statutory obligation, not a contractual one.

Research by court counsel have produced only two cases which address this issue and one case comes down on each side of the issue. In *Laborers Health & Welfare Trust Fund v. Hess*, 594 F.Supp. 273 (N.D. Calf. 1984) the court in a carefully reasoned opinion concluded that Sections 502 and 515 of the Employer Retirement Income Security Act, quoted above, do provide a basis for jurisdiction over suits to collect contributions owing after expiration of collective bargaining agreements. Id. at 282. In *Mo-Kan Teamsters Pen. Fund v. Botsford Ready Mix*, 605 F.SUpp. 1441 (W.D. Mo. 1985) the court, after considering the decision in *Laborers Health & Welfare Trust Fund v. Hess*, reached a contrary result.

Laborers Health & Welfare Fund v. Hess, supra, was predicated upon the provisions of 29 U.S.C. § 1392(a), relating to employer withdrawals included in a new subtitle, added by 1980 amendmants. Pub.L. 96--364. There the term "obligation to contribute" is defined, "*for purposes of this part*", (emphasis supplied) to mean an obligation ... "arising—(1) under one or more collective bargaining (or related) agreements, or (2) as a result of a *duty under applicable labor-management relations law.*" (emphasis supplied) Section 1392 is contained in Part 1 "Employer Withdrawals" of Subtitle E of Subchapter III, while Sections 1132 and 1145 are contained in Part 5 "Administration and Enforcement" of Subtitle B Subchapter I of the statute. The court concluded that because of the absence of such a definition in Subchapter I, the definition from Subchapter II would be applied there. Id. at 279. The court also found significance in the phrase used in § 1132 regarding " 'obligations *under the terms* of a collective bargaining agreement,' rather than 'obligations *under a collective bargaining agreement.*' " Id. at 279 (emphasis supplied).

While a layman reading this opinion (however unlikely that may be) would view the matter as an exercise in judicial hair splitting, we must always be aware that the federal district courts are courts of *limited jurisdiction. See Owen Equip. and Erection Co. v. Kroger,* 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978), "It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." 437 U.S. at 374, 98 S.Ct. at 2403. The federal courts are without power to create jurisdiction. See *American Fire & Casualty Co. v. Finn,* 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951). "The jurisdiction of the

courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties." 341 U.S. at 17, 71 S.Ct. at 542.

[8] Thus, however desirable it might appear to the judiciary that a single judicial remedy should be provided for all contributions to trust funds allegedly owed by employers, whether the obligation to pay arisis from the contract or from a statutory duty, only the Congress can make such a provision. The Congress has declared that the definition in Section 1392 is "for purposes of this part." Application of a definition found in one part of a statute to a different part of the statute, when the Congress has specifically limited the definition to the one part, is not sound statutory construction. *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C.Cir. 1976), cert. denied, 434 U.S. 1086, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978). Nor can this court discern a difference in the meaning of an "obligation under the terms of an agreement" and an "obligation under an agreement." Neither phrase incorporates an "obligation imposed by labor-management relations law" and both are restricted to obligations arising from the agreement. As noted above, this court is unconvinced that an agreement which by its own terms has fully expired can "survive" or create any obligation in the absense of some such provision in the agreement—in which case it would not be fully expired.

[9] Without repeating the detailed analysis contained in both judicial opinions, this court sides with the result in *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Co.*, supra. If the Congress had intended to confer jurisdiction upon the district courts to enforce payment of all

employee fringe benefit contributions whether obligated "under the terms of a collectively bargained agreement" or "under the provisions of any section of the National Labor Relations Act," it would have said so. It did not. Accordingly, this court concludes that, for reasons best known to itself, the Congress, in its wisdom, has left the N.L.R.B. vested with exclusive jurisdiction over alleged employer unfair labor practices arising by reason of failure to make welfare benefit contributions following expiration of collective bargaining agreements. It follows that this court has no subject matter jurisdiction and the motion to dismiss is hereby GRANTED.

Judgment will be entered accordingly.

APPENDIX D

STATUTES INVOLVED

A. National Labor Relations Act, As Amended

Section 7 of the National Labor Relations Act, as amended (hereinafter "NLRA"), 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 of the NLRA, 29 U.S.C. § 158, provides in relevant part:

> (a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

....

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents--

....

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is--

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to

enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular

work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual

employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

....

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State of Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of

a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence,the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) It shall be an unfair labor practice for any labor organization and any employer to

enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber

> or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception...

B. Labor Management Relations Act of 1947, As Amended

Section 301(a) of the Labor Management Relations Act of 1947, as amended (hereinafter "LMRA"), 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 302 of the LMRA, 29 U.S.C. § 186, provides in relevant part:

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged

in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act [footnote omitted]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable...(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in

> the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities..,

Section 303 of the LMRA, 29 U.S.C. § 187, provides:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

C. Employee Retirement Income Security Act of 1974, As Amended

Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, as amended (hereinafter "ERISA" 29 U.S.C. § 1132(a)(3), provides

A civil action may be brought...

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this

> subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

Section 502(b)(2) of ERISA, as added by Section 306(b)(1) of the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter "MPPAA"), 29 U.S.C. § 1132(b)(2), provides:

> The Secretary shall not intitiate an action to enforce section 1145 of this title.

Section 502(f) of ERISA, 29 U.S.C. § 1132(f), provides:

> The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

Section 502(g)(2) of ERISA, as added by Section 306(b)(2) of the MPPAA, 29 U.S.C. § 1132(g)(2), provides:

In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan--

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of--
(i) interest on the unpaid contributions, or
(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

Section 515 of ERISA, as added by Section 306(a) of the MPPAA, 29 U.S.C. § 1145, provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Section 4201(a) of ERISA, as added by Section 104(2) of the MPPAA, 29 U.S.C. § 1381(a), provides:

> If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

Section 4203 of ERISA, as added by Section 104(2) of the MPPAA, 29 U.S.C. § 1383, provides in relevant part:

> (a) For purposes of this part, a complete withdrawal from a

multiemployer plan occurs when an employer--

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b)(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if--

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan--
(i) primarily covers employees in the building and construction industry, or
(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if--

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer--
(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or
(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 1341a(a)(2) of this title), paragraph (2) shall be applied by substituting "3 years" for "5 years" in subparagraph (B)(ii).

....

(e) For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations.

Section 4212(a) of ERISA, as added by Section 104(2) of the MPPAA, 29 U.S.C. § 1392(a), provides:

For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising--

(1) under one or more collective bargaining (or related) agreements, or
(2) as a result of a duty under applicable labor-management relations law, but does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

Section 4221 of ERISA, as added by Section 104(2) of the MPPAA, 29 U.S.C. § 1401, provides in relevant part:

(b)(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the

> issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.
>
> ....
>
> (d) Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

Section 4301 of ERISA, as added by Section 104(2) of the MPPAA, 29 U.S.C. § 1451, provides in relevant part:

> (b) In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment

within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdction over an action brought by a plan fiduciary to collect withdrawal liability.

D. Multiemployer Pension Plan Amendments Act of 1980

Section 3 of the MPPAA, 29 U.S.C. § 1001a, provides:

(a) The Congress finds that--

(1) multiemployer pension plans have a substantial impact on interstate commerce and are affected with a national public interest;

(2) multiemployer pension plans have accounted for a substantial portion of the increase in private pension plan coverage over the past three decades;

(3) the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans; and

(4)(A) withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations, and

(B) in a declining industry, the incidence of employer withdrawals is higher and the adverse effects described in subparagraph (A) are exacerbated.

(b) The Congress further finds that--

(1) it is desirable to modify the current multiemployer plan termination insurance provisions in order to increase the likelihood of protecting plan participants against benefit losses; and

(2) it is desirable to replace the termination insurance program for multiemployer pension plans with an insolvency-based benefit protection program that will

> enhance the financial soundness of such plans, place primary emphasis on plan continuation, and contain program costs within reasonable limits.
>
> (c) It is hereby declared to be the policy of the Act--
>
> (1) to foster and facilitate interstate commerce,
>
> (2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans,
>
> (3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and
>
> (4) to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans.

The other pertinent portions of the MPPAA added sections to ERISA and are reproduced supra with the appropriate section of ERISA.

Supreme Court, U.S.
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Number 86-262

In The
Supreme Court of the United States

OCTOBER TERM, 1986

U.A. 198 HEALTH & WELFARE,
EDUCATION & PENSION FUNDS,
Petitioners,

VERSUS

RESTER REFRIGERATION SERVICE, INC.
Respondent.

Brief in Opposition to Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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85

TABLE OF CONTENTS

Page

Question Presented ii

Table of Authorities iii

Statement of the Case 1

Summary of Argument 4

Response to Reasons for Granting the Writ 5

Conclusion 19

Certificate 20

QUESTION PRESENTED

Does the Federal District Court or the National Labor Relations Board have primary jurisdiction to determine the issue of the necessity of an employer to continue to pay into an Employee Benefit Trust Fund after expiration of the Collective Bargaining Agreement which had previously existed between the Employer and the Union, and more importantly, whether or not the discontinuance of these payments by the employer is an issue which arises under the requirements of §8(a)(5) of the National Labor Relations Act, as amended, 29 U.S.C. 158(a)(5), making it an issue to be decided by National Labor Relations Board, or is it a requirement of §§502 and 515 of Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§1132 and 1145, making it an issue to be decided by the Federal District Court?

TABLE OF AUTHORITIES

Cases: *Page*

Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 515-17 n. 11 (5th Cir. 1982), *cert. denied*, 464 U.S. 932, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983) 17
Cement Masons Health and Welfare, etc., v. Kirkwood-Bly., 520 F.Supp. 194 (N.D. Calif. 1981) aff'd. 692 F.2d 641 (9th Cir. 1982) ... 7, 9, 11
Hinson v. NLRB, 428 F.2d 133 (8th Cir. 1970) 5, 6
I.A.M. Nat'l. Pension Fund v. Schulze Tool & Div. Co., Inc., 564 F.Supp. 1285 (N.D. Cal. 1983) 9
Laborers Health & Welfare Fund v. Hess, 594 F.Supp. 273 (N.D. Cal. 1984) 9
Laborers Health and Welfare Trust Fund For Northern California v. Advanced Lightweight Concrete Company, Inc., 779 F.2d 497 (9th Cir. 1985) 11, 12, 13, 16, 17
Local Union No. 25, International Brotherhood of Teamsters v. New York, New Haven and Hartford Co., 350 U.S. 155, 160, 76 S.Ct. 227, 230, 100 L.Ed. 166 (1956) 16
Mill Cabinet Health & Welfare Fund for Matheson Calif. v. Kitchen Fixtures, Inc., (C-82-0974 SW) (JSB) Unpublished 9
Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix, 605 F.Supp. 1441 (W.D. Mo. 1985) 2, 11, 12, 13, 14
Moldovan v. Great Atlantic and Pacific Tea Company, Inc., 790 F.2d 894 (3rd Cir. 1986) ... 17
NLRB v. Katz, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962) 5, 11, 12
Office of Professional Employees Insurance Trust Fund v. Laborers Funds Administrative Office of Northern California, Inc., 783 F.2d 919 (9th Cir. 1986) 16, 17

Page

Pattern Makers' Pension Trust Fund v. Badger Pattern Works, Inc., 615 F.Supp. 792 (N.D. Ill. E.D. 1985) 15

Peerless Roofing Co. v. NLRB, 641 F.2d 739 (9th Cir., 1981) 6

Plumbers and Steamfitters Local 298 v. County of Door, 359 U.S. 354, 357-58, 79 S.Ct. 844, 846, 3 L.Ed.2d 872 (1959) 17

Rosen v. Hotel and Restaurant Employees and Bartenders Union, 637 F.2d 592, 600 (3d. Cir. 1981), *cert. denied*, 454 U.S. 898, 102 S.Ct. 398, 70 L.Ed.2d 213 (1982) 17

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959) 6

Smith v. Evening News Association, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962) 7

U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc., 790 F.2d 423 (5th Cir. 1986) 14, 17

U.A. 198 Health & Welfare, Education and Pension Fund v. Rester Refrigeration Service, Inc., 612 F.Supp. 1033 (D.C. La. 1985) 14

Statutes:

Sections 502 and 515 of the Employee Retirement Income Security Act; 29 U.S.C. §§1132 & 1145 ..... 3, 4, 9, 10, 12, 13, 18

Section 4212(a) of the Employee Retirement Income Security Act; 29 U.S.C. §1392(a) ... 10, 12

Section 301 of the Labor Management Relations Act; 29 U.S.C. 185(a) 5, 6, 7, 8, 15

Section 302(c)(5) of the Labor Management Relations Act; 29 U.S.C. 186(c)(5) 15

Section 8(a)(5) of the National Labor Relations Act, as amended; 29 U.S.C. 158(a)(5) 2, 4, 5, 7, 8, 10, 18

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RESTER REFRIGERATION SERVICE, INC.
Respondent.

Brief in Opposition to Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

STATEMENT OF THE CASE

Rester Refrigeration Service, Inc. (RESTER) is a Baton Rouge, Louisiana based employer. Rester was a signatory to a collective bargaining agreement with the United Association Local 198. The collective bargaining agreement expired on April 30, 1984 and Rester has not signed a new agreement.

The bargaining agreement, while it was in effect, required Rester to pay into U.A. Health & Welfare Education & Pension Fund periodic payments and contribu-

tions. When the collective bargaining agreement expired and an impasse in collective bargaining was reached with Local 198, Rester discontinued making such contributions.

Rester was current in its schedule of payments through April 30, 1984. Rester began its own negotiations with Local 198 on April 10, 1984, April 19, 1984 and April 26, 1984. The negotiations fell into an impasse and were stopped after the April 26, 1984 meeting. No formal negotiations have occurred since that date.

This action was then filed by plaintiff, United Association Local 198 Health & Welfare, Education & Pension Funds, on April 2, 1985. Rester filed a Motion for Summary Judgment and/or Motion to Dismiss for lack of subject matter jurisdiction. The District Court granted Rester's Motion on the grounds that the complaint failed to state a claim upon which relief could be granted and held that no federal court jurisdiction existed for an action of this kind.

As stated in the Petitioner's Statement of the Facts, the District Court relying on *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Company*, 605 F.Sup. 1441 (W.D. Mo. 1985) felt that the primary issue was whether or not an impasse was reached between Rester and the Union. Rester's failure to prove an impasse would require Rester to continue to make payments to the fringe benefit funds as a requirement for the satisfaction of §8(a)(5) of the National Labor Relations Act (NLRA). The District Court felt that under § 8(a)(5) the National Labor Relations Board (NLRB) had primary jurisdiction to determine all alleged employer unfair trade practices, one

of which clearly could be the failure of an employer to pay into the employee benefits trust fund after the expiration of the collective bargaining agreement but prior to an impasse. The District Court reviewed the requirements of §§502 and 515 of Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§1132 and 1145 and determined that even though these sections provided for federal court jurisdiction in the collection of contributions from employers into employee benefit trust funds during the existence of a collective bargaining agreement that they do not provide the district court with additional jurisdiction over issues which arose after the expiration of that agreement. The District Court concluded, and rightly so, that collective bargaining agreements cease to exist on their expiration date and do not survive for the purpose of giving the District Court jurisdiction under the above cited ERISA statutes. The District Court further concluded that an attempt to impute definitions supplied for a different Part of the Employee Retirement Income Security Act, which definitions might be interpreted to suggest that §§502 and 515 of ERISA were intended to control the jurisdictional question in issues which arose after the expiration of the collective bargaining agreement, would not be sound statutory construction.

The Fifth Circuit Court of Appeals affirmed the District Court decision after reviewing all issues and decided that the primary concern in this matter would be the issue of whether or not the parties had reached an impasse and whether or not the employer had committed an unfair labor practice. The Court felt that there was no statutory language in ERISA which would compel the court to replace the primary jurisdiction accorded the NLRB in

these issues with Federal Court jurisdiction as provided by ERISA in §515. The Court of Appeals also felt that you clearly could not engraph the definitions of one part of the ERISA statute, which definitions were exclusively for that Part of the statute, to another Part in order to stretch the jurisdictional authority of the Federal District Courts into issues which exclusively involve an alleged unfair labor practice under §8 of the NLRA.

It is from these decisions that the plaintiff has taken its Application for Writs to this Honorable Court.

SUMMARY OF ARGUMENT

This suit alleges that Rester failed to make contributions to an Employee Benefit Trust Fund that were required originally under the terms of an expired collective bargaining agreement. This alleged failure to make such contributions, if established by Petitioner as occurring prior to an impasse, would be an unfair labor practice on the part of Rester, see 29 U.S.C. 158(a)(5); §8(a)(5) NLRA. It is clear that all such alleged unfair labor practices which are arguably subject to the provisions of §8 of the NLRA would be referred to the NLRB. However, Petitioner argues that under this fact situation the alleged breach by Rester would fall within the Federal Court's jurisdiction under §§502 and 515 of the Employee Retirement Income Security Act; 29 U.S.C. 1132 & 1145. Contrary to Petitioner's arguments, at least three Federal District Courts and three different Circuit Courts of Appeal have decided that the proper jurisdiction for such action would lie with the NLRB since the cause of action arose as a result of the requirements of §8(a)(5) and not as a result of the "survival" of an expired collective bargaining agreement.

RESPONSE TO REASONS FOR GRANTING THE WRIT

The complaint originally filed in this matter asserted jurisdiction of the Federal Courts through Section 301 of the Labor Management Relations Act (LMRA); 29 U.S.C. 185 and under §§502 and 515 of the Employee Retirement Income Security Act (ERISA); 29 U.S.C. 1132 and 29 U.S.C. 1145. The Petitioner has however, abandoned its claim that the Federal Courts have jurisdiction of this matter under authority provided by §301 of the LMRA.

In reviewing the question of jurisdiction between the Federal Courts and the NLRB, in general, it is clear that traditionally, the NLRB has maintained jurisdiction over questions of "unfair labor practices" as set forth under 29 U.S.C. §158; §8 NLRA.

Under Section 29 U.S.C. §158(a)(5); Section 8(a)(5) NLRA, the overwhelming jurisprudence has been interpreted to require that an employer maintain the status quo of the employees, including the conditions of employment and fringe benefits, during the collective bargaining process.[1] See *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962). This requirement is mandatory even after the expiration of the collective bargaining agreement, See *Hinson v. NLRB*, 428 F.2d 133 (8th Cir. 1970).[2]

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[1] The pertinent part of 29 U.S.C. §158 (a)(5) states:

"(a) It shall be an unfair labor practice for an employee . . .

(5) to refuse to bargain collectively with the representatives of his employer . . ."

[2] The Court in *Hinson*, supra, stated:

"The spirit of the National Labor Relations Act and the more persuasive authorities stand for the proposition that, even after

The Court in *Hinson*, supra, as well as other courts[3] have also said that despite the necessity of maintaining the status quo during collective bargaining, that the collective bargaining agreement did not survive its expiration date but its provisions survived in limited form only because of the NLRA. The Court in *Hinson*, supra, stated:

> "The order does not compel petitioner to agree to any new or different contract provision; it simply requires him to abide by an obligation once extant by reason of the binding contract but then continuing on after its expiration, in limited form, not by reason of the contract itself but because of the dictates of the policy embodied in the National Labor Relations Act."

In general, therefore, the Courts have stated that violations of 29 U.S.C. 158 must be heard before the NLRB and the District Courts would have no jurisdiction to consider these matters, see *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 775 (1959).

An exception to the above, however, developed through Section 301 LMRA; 29 U.S.C. 185, wherein the Federal Court was given jurisdiction to enforce the provisions of collective bargaining agreements, in particular, 29 U.S.C. 185 (a).[4] The jurisprudence then began

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expiration of a collective bargaining contract, an employer is under an obligation to bargain with the Union before he may permissibly make any unilateral change in the terms and conditions of employment."

[3] See also, *Peerless Roofing Co. v. NLRB*, 641 F.2d 739 (9th Cir., 1981).

[4] Section 301(a) of LMRA 29 U.S.C. 185(a) states in part:
"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affect-

turning to dual jurisdiction between Federal Courts and NLRB in the enforcement of collective bargaining agreements which may also include the determinations of an unfair labor practice issue. The Courts seemed to imply that just because there may have been an unfair labor practice [§8(a)(5)] arising out of the breach of a collective bargaining agreement that it did not mean that the Federal Court would not have jurisdiction. The Courts initially felt that Section 301 LMRA would provide such jurisdiction to the Federal Courts despite the possibility of an unfair labor practice. See *Smith v. Evening News Association*, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed. 2d 246 (1962). Therefore, the conflict arose as to how to handle the particular fact situation we have in this matter, i.e., the possible failure of an employer to maintain the status quo after the expiration date of a collective bargaining agreement, which would again bring into conflict an alleged unfair labor practice and the enforcement of the purposes behind the expired collective bargaining agreement.

The first case to squarely face this issue was *Cement Masons Health and Welfare, etc. v. Kirkwood-Bly.*, 520 F.Supp. 194 (N.D. Calif. 1981), affirmed 692 F.2d 641 (9th Cir. 1982) wherein the Court stated:

> "Defendant argues that any claim plaintiffs have for trust fund contributions arise by virtue of section 8(a)(5) of the Act. The Garmon doctrine vests primary jurisdiction of cases arising under the Act in the

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ing commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

N.L.R.B. Thus, defendant urges that we dismiss the action. Plaintiffs, quoting language similar to what is quoted above, argue that the contract itself survives its expiration date. Hence, they argue that this is a suit under section 301—to enforce a collective bargaining agreement—and is therefore properly in the district court.

We believe that defendant's characterization is correct for several reasons. Most importantly, plaintiffs' suit depends entirely upon the existence of section 8(a)(5) which requires the employer to maintain the status quo during negotiations for a new collective bargaining agreement. This is obviously done in reference to the prior agreement, and, therefore, the collective bargaining agreement can be said to "survive" its expiration. However, it does so only because of section 8(a)(5). Plaintiffs cite no case, nor can we find any, which have permitted district courts to enforce properly expired collective bargaining agreements in a section 301 action.

Indeed, extensive research reveals that all cases establishing the principle that the employer must continue trust payments even after the expiration of the agreement arose from N.L.R.B. proceedings."

This Court put to rest this issue by declaring that the NLRB would maintain jurisdiction for actions which arose under this factual situation because it was *not* a cause of action which arose under a collective bargaining agreement, as required under Section 301, since the collective bargaining agreement would not survive its own termination date. The Court stated that the collective bargaining agreement would only be used to provide the perimeters to establish the status quo requirement under Section 8(a)(5) NLRA.

This decision then brought on new attempts to es-

tablish Federal Court jurisdiction under the present fact situation by using the provisions of §§502 and 515 of the Employee Retirement Income Security Act (ERISA); 29 U.S.C. 1132 and 29 U.S.C. 1145.[5] Section 502 provides Federal Court jurisdiction for an action which arose under §515.

Although in *Kirkwood-Bly., Inc.*, supra, the Court acknowledged the possible ERISA action under a similar fact situation it did not decide such an issue. In an early decision, the Federal Court in *I.A.M. Nat'l. Pension Fund v. Schulze Tool & Div. Co., Inc.*, 564 F.Supp. 1285 (N.D. Cal. 1983) did decide a case with similar issues involved but there was no jurisdictional questions raised and therefore, it was not considered.[6]

The first case to face this specific issue and relied on almost exclusively by petitioner is *Laborers Health & Welfare Fund v. Hess*, 594 F.Supp. 273 (N.D. Cal. 1984). This Court specifically set forth two basic propositions on which it relied on in reaching a decision that there was Federal Court jurisdiction over this particular fact situation. The Court felt that (1) the definition of "obligations

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[5] In particularly §515 provides:
"Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement."

[6] In addition, the unpublished case of *Mill Cabinet Health & Welfare Fund for Matheson Calif. v. Kitchen Fixtures, Inc.*, (C-82-0974 SW) (JSB) as cited in Footnote 5 of *Laborers Health & Welfare Fund v. Hess*, 594 F.Supp. 273 (N.D. Cal. 1984) decided that the Federal Court did not have jurisdiction over a Section 515 allegation involving an expired collective bargaining agreement, but there also, the Court gave no authority for its decision.

to contribute" as defined in 29 U.S.C. §1392(a) should be used to define the employers obligation to contribute under §515 and that (2) the use of the phrase in §515 " . . . Under the terms . . ." should require that an obligation to contribute under the terms of an expired collective bargaining agreement would also fall under the jurisdiction of the Federal Court.[7]

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[7] For clarification the *Hess* court said in regards to number 1 above:

"Plaintiffs have, however, observed that in the part of ERISA dealing with employer withdrawals, the term 'obligation to contribute' is defined as 'an obligation to contribute arising . . . (1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law.' 29 U.S.C. §1392(a) (1982) (emphasis added). From that definition, and from the absence of a definition of 'obligation to contribute' in the subchapter of ERISA including section 515, plaintiffs properly conclude that the phrase 'obligated to make contributions' in section 515 includes an obligation to contribute arising under section 8(a)(5) of the NLRA.

and in regards to number 2 above:

"But, contrary to plaintiffs' assertions, that conclusion is not by itself sufficient to compel the further determination that section 515 applies to employers whose obligations to contribute arises from section 8(a)(5) of the NLRA. Rather, an examination of the remainder of the statutory language is necessary to determine whether it imposes any limitations on the language 'employer . . . obligated to make contributions.' If, for instance, the statute mandated the payment of contributions by '[e]very employer who is obligated to make contributions under a collective bargaining agreement,' it would be clear that an obligation arising as a result of section 8(a)(5) would not be covered. Examination of the statute reveals, however, that there is no such limitation. The statute dictates that '[e]very employer who is obligated to make contributions . . . under the terms of a collectively bargained agreement shall . . . make such contributions.' (Emphasis added) Congress's decision to speak in terms of 'obligations under the terms of a collective bargaining agreement,' rather that 'obli-

Following the *Hess* decision, the Courts in the Western District of Missouri, *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix*, 605 F.Supp. 1441 (W.D. Mo. 1985), and the Ninth Circuit, *Laborers Health and Welfare Trust Fund For Northern California v. Advanced Lightweight Concrete Co., Inc.*, 779 F.2d 497 (9th Cir. 1985), both under similar fact situations, issued opinions which contradicted *Hess*. The Court in *Botsford*, supra, states after review of the *Hess* decision, that the operative reason why the Federal Courts should not have jurisdiction in this matter was the lack of a contract (collective bargaining agreement) once the agreement has expired, even though there are maintenance of "status quo" requirements.[8]

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gations under a collective bargaining agreement,' suggests that it meant to include obligations arising as a result of section 8(a)(5) of the NLRA. Cf. Kirkwood-Bly, 520 F.Supp. at 945 (section 8(a)(5) obligation to continue trust fund contributions after expiration of collective bargaining agreement arises under the terms of the agreement not under the agreement itself)."

[8] The Botsford Court stated:
"Section 8(a)(5) implicitly requires an employer to maintain the status quo during negotiations for a new collective bargaining agreement even though the prior agreement has come to an end. *N.L.R.B. v. Katz*, 369 U.S. 736, 743-44, 82 S.Ct. 1107, 111-12, 8 L.Ed.2d 230 (1962). The status quo, of course, will be heavily dependent on the terms of the prior agreement. Thus it is sometimes said that the terms of the agreement "survive" the expiration of the agreement. See e.g. *Cement Masons Health & Welfare Trust Fund v. Kirkwood-Bly, Inc.*, 520 F.Supp. 942 (N.D. Cal. 1981). Nonetheless, it is the status quo, and not the terms of the written contract that must be maintained. Unilateral changes of conditions without prior discussion with the union are prohibited, not because of any agreement on the employer's part, but because to allow such changes would enable an employer to circumvent the duty to negotiate and frustrate the ob-

In addition, the Court, in *Advanced*, supra, reviewed the two main issues presented in the *Hess* decision and stated that it felt that the *Botsford* decision clearly pointed out that §1392(a) definitions expressly refer only to the withdrawal liability set forth in that Part of the ERISA statute. The Court further felt that Congress intended the definitions set forth in §1392(a) should remain with and refer only to withdrawal liability instead of expending the liability created under §515 and " . . . a more plausible conclusion is that Congress intended withdrawal liability to be more broadly based than employers' general liability for ERISA violations". In other words, Congress' failure to make it perfectly clear that the definitions were to be applied to more than one Part of the statute meant that the more broadly interpreted definitions provided for under withdrawal liability §1392(a) should not be applied to §515 liability which Part does not have a similar definition and is obviously intended by Congress to be more narrowly interpreted.

The Court in *Advanced*, supra, further stated in regard to the *Hess* decision that the use of the phrase ". . . under the terms . . ." in §515 without any further definitions obviously meant that Congress intended §515 liability be less extensive than the withdrawal liability set forth under §1392(a)(1) under the definitions ". . . obli-

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jectives of §8(a)(5). *Katz*, at 369 U.S. 743, 82 S.Ct. 1111. Once a union has been offered a chance to negotiate on a mandatory issue, and an impasse is reached, an employer may put into effect changes which were the subject of negotiation, but which were not agreed to. When it is considered that one of the terms of the contract was the expiration date, it is clear that the 8(a)(5) status quo requirement exists in spite of and not because of, the literal terms of the contract.

gations to contribute . . .". The *Botsford*, supra, Court felt that, "[T]here is no reason to believe that Congress would use an ambiguous, metaphysical concept to define an obligation [in section 515] when it has used a crystal clear definition elsewhere [in section 1392] in the same act.".

Finally, the Court in *Advanced*, supra, commented on one final portion of the *Hess* decision wherein that Court relied heavily upon statements made in hearings by Congressional sponsors of proposed §515. Petitioner in this matter also relies heavily on these Congressional hearings in an effort to interpret the intent behind §515. The Court, in *Advanced*, supra, felt that there was no indication existing in the Congressional hearing that indicated that Congress considered the problem of continuing obligations from expired agreements much less that it had any view on resolving any conflict between §515 and the primary jurisdiction of the NLRB. In fact, in footnote 12, the Court in *Advanced*, supra, specifically points out that under one committee hearing it appears that there was an attempt to limit the jurisdiction of §515 and in another hearing that opposite view seemed to prevail.[9] See

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[9] Advanced refers to a staff report to the responsible Senate Committee which states that § 515's purpose was to avoid "complex litigation concerning claims and defenses unrelated to the employer's promise and the Plan's entitlement to the contributions." Senate Committee on Labor and Human Resources, 96 Cong., 2d Sess. 44 (Comm.Print 1980). Advanced asserts that this demonstrates Congressional intent to limit § 515 to pure contractual obligations not obligations continued by the mandates of other statutes. A contrary interpretation of Congressional intent might be gleaned from a statement of both sponsors of the bill: "The bill imposes a Federal statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans." 126 Cong.Rec. 23039 (statement of Rep. Thompson); *id.* at 23,288 (statement of Sen. Williams). This statement may suggest that the source of the employer's

also Judge Parker's comments in *U.A. 198 Health & Welfare, Education and Pension Fund v. Rester Refrigeration Service, Inc.*, 612 F.Supp. 1033 (D.C. La. 1985) regarding the *Hess* decision[10] and the comments of Judge Wisdom in *Rester*, supra, Footnote 17[11].

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obligation is irrelevant to his duty to contribute.

Both analyses are plausible, especially when the highlighted phrases are examined out of context. In truth, no conclusion concerning Congressional intent over the availability of § 515 in a situation such as this could be proper given the absence of any indication that Congress was aware of the potential for conflict between § 515 and §§ 7 and 8 of the NLRA.

[10] "This Congress has declared that the definition in Section 1392 is 'for purposes of this part'. Application of a definition found in one part of a statute to a different part of the statute, when the Congress has specifically limited the definition to the one part, is not sound statutory construction. *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978). Nor can this court discern a difference in the meaning of an 'obligation under the terms of an agreement' and an 'obligation under an agreement'. Neither phrase incorporates an 'obligation imposed by labor-management relations law' and both are restricted to obligations arising from the agreement. As noted above, this court is unconvinced that an agreement which by its own terms has fully expired can "survive" or create any obligation in the absence of some such provision in the agreement—in which case it would not be fully expired.

Without repeating the detailed analysis contained in both judicial opinions, this court sides with the result in *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Co.*, supra. If the Congress had intended to confer jurisdiction upon the district courts to enforce payment of all employee fringe benefit contributions whether obligated "under the terms of a collectively bargained agreement" or "under the provisions of any section of the National Labor Relations Act," it would have said so. It did not."

[11] Both sponsors of the bill stated that it "imposes a Federal Statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans". 126 Cong. Rec. 23039 (statement of Rep. Thompson); *id.* at 23288 (statement of Sen. Wil-

Under Part I of Petitioner's Reasons for Granting of the Writ, they ask the Court to make one final consideration worthy of the Court's attention. Petitioner implies that the fact that the requirements of §302(c)(5) of the LMRA, which requires that the details of employee benefit trust funds be set forth in separate agreements, might breathe life into those agreements after the expiration of the related collective bargaining agreement. There has been no indication in these proceedings that the employee benefit trust fund would have survived as a separate agreement outside the collective bargaining agreement Rester executed. The Court facing this issue in *Pattern Makers' Pension Trust Fund v. Badger Pattern Works, Inc.*, 615 F.Supp. 792 (N.D. Ill. E.D. 1985) stated that ". . . jurisdiction over suits based on a separate trust agreement was not proper under §301 of the NLRA because a trust agreement 'does not qualify as a contract between an employer and labor organization under NLRA §301(a).'". It is likewise clear in this matter that without the collective bargaining agreement there would have been no separate trust agreement in existence and the trust agreement whether or not it contained the specific terms of the payments of benefits to the trust, still expired as far as Rester was concerned upon expiration of the collective bargaining agreement. See, *Office and*

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liams). The Committee Print states that § 515 is intended to prevent "complex litigation concerning claims and defenses unrelated to the employer's promise and the Plan's entitlement to the contributions." Senate Comm. on Labor and Human Resources, 96th Cong., 2nd Sess. at 44 (Comm. Print 1980). The statements in the Congressional Record, taken alone, might be viewed as supporting the Fund's position. The statement in the Committee Print, taken alone, might be viewed as supporting the employer's position. We decline to attach great significance to either statement.

Professional Employees Insurance Trust Fund v. Laborers Funds Administrative Office of Northern California, Inc., 783 F.2d 919 (9th Cir. 1986).

Petitioner in Part II of its Reasons for Granting of the Writ would have this Court believe that the trust and the trustees would be negligent in their duty by seeking to enforce whatever remedies it feels it is entitled to before the NLRB. Petitioner would have this Court believe that the NLRB's procedures are slow, cumbersome, dilatory and unreceptive to the needs of the trustees. Quite to the contrary of petitioner's belief, the Courts have time and time again made it perfectly clear that it is the expertise of the NLRB, to determine the key issue in this matter, i.e. whether or not an impasse has been reached and whether or not there has been an unfair labor practice, which are required to provide a fair determination of the issue. The ultimate decision in this case will be based on facts and minute details which must be weighed with the expertise of the NLRB in order to reach a fair and just decision.

The trustees have every right to seek payment, if they feel they are entitled, of the contributions by an employer subsequent to the expiration of a collective bargaining agreement. The Court in *Advanced*, supra, made it perfectly clear that there is no bar to the Trust Fund filing for unfair labor practices,[12] nor would the trustees

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[12] "Denying district court jurisdiction to the trust funds need not prejudice their claims against Advanced. There is no bar to the trust funds' filing an unfair labor practice charge against Advanced. 29 U.S.C. § 160(b); 29 C.F.R. § 102.9 ('A charge that any person has engaged in or is engaging in an unfair labor practice affecting commerce may be made by any person.'); *see Local Union No. 25, International Brotherhood of Teamsters v. New York, New Haven and*

be breaching their fiduciary duty to the beneficiaries of the trust by seeking relief under the NLRA through the NLRB.[13]

Therefore to request that this Court change the traditional jurisdiction with regard to unfair labor practices from the NLRB to the District Court based on the alleged cumbersome procedures and the potential inequitable results which may be derived from use of the NLRB is totally without merit and would place the responsibility on the District Court to make decisions in an area which has been, by legislative design, left to the NLRB.

It is therefore clear that three Circuit Courts, the 9th Circuit[14], the 5th Circuit[15] and the 3rd Circuit[16] have all

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Hartford Co., 350 U.S. 155, 160, 76 S.Ct. 227, 230, 100 L.Ed 166 (1956) (railroad may file unfair labor practice charge); *Plumbers and Steamfitters Local 298 v. County of Door*, 359 U.S. 354, 357-58, 79 S.Ct. 844, 846, 3 L.Ed.2d 872 (1959) (county may file charge); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 515-17 n. 11 (5th Cir. 1982), *cert. denied*, 464 U.S. 932, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983) ('[A]ny person, even a stranger to the collective bargaining agreement, can bring unfair labor practice charges.')

[13] "The availability of an NLRB remedy to the trust funds obviates any potential fiduciary liability of the trustees to the fund beneficiaries caused by the dismissal of the §515 suit. *See Rosen v. Hotel and Restaurant Employees and Bartenders Union*, 637 F.2d 592, 600 (3d. Cir. 1981), *cert. denied*, 454 U.S. 898, 102 S.Ct. 398, 70 L.Ed.2d 213 (1982); *Kaufman*, 707 F.2d at 416.

[14] See, *Laborers Health and Welfare Trust Fund For Northern California v. Advanced Lightweight Concrete Company, Inc.*, 779 F.2d 497 (9th Cir. 1985) and *Office and Professional Employees Insurance Trust Fund v. Laborers Funds Administrative Office of Northern California, Inc.*, 783 F.2d 919 (9th Cir. 1986).

[15] See, *U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986).

[16] See, *Moldovan v. Great Atlantic and Pacific Tea Company, Inc.*, 790 F.2d 894 (3rd Cir. 1986).

agreed that §515 while giving rise to Federal Court jurisdiction on enforcement of the collection of trust fund payments does so only through the existence of a valid collective bargaining agreement. The fact that §8(a)(5) of the NLRA requires that an employer maintain the status quo after the expiration of a collective bargaining agreement and the fact that the jurisprudence has stated that payment into a trust fund can be part of that status quo, does not breathe life back into a "dead" collective bargaining contract. The mere fact that the terms of an expired collective bargaining agreement may be used as the perimeters for establishing the status quo, does not provide a "contract" which is required for the Federal Courts to have jurisdiction under a §515 action.

CONCLUSION

The District Court and the Fifth Circuit Court of Appeals properly maintained Rester's Motion to Dismiss because the action itself properly lies with the National Labor Relations Board; neither the LMRA nor ERISA, under the circumstances presented to the Court, gives rise to federal subject matter jurisdiction. Rester suggests that this Court uphold the correctness of the District Court's decision and that this writ be denied.

Respectfully submitted:

CAMP, CARMOUCHE,
BARSH, GRAY, HOFFMAN &
GILL

BY: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari on all counsel of record by placing same in the United States mail, postage prepaid and properly addressed.

BATON ROUGE, ~~LOUISIANA~~, this 18 day of September, 1986.

DANIEL K. RESTER

B-8689, 9-86, 50

(3)

Supreme Court, U.S.
FILED
FEB 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-262

In the Supreme Court of the United States

OCTOBER TERM, 1986

U.A. 198 HEALTH & WELFARE, EDUCATION AND PENSION FUNDS
Petitioners

VERSUS

RESTER REFRIGERATION SERVICE, INC.
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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3 pp

Petitioners wish to inform the Court of a very recent case development affecting this pending Petition. On February 23, 1987, the Court granted a writ of certiorari to the Ninth Circuit in *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Company,* No. 85-2079. The issue presented for review in this Petition is identical to that raised in *Advanced Lightweight, supra:* whether the Employee Retirement Income Security Act of 1974 creates a direct cause of action to collect post-contract expiration employee benefit plan contributions from delinquent signatory employers.

The Court was earlier informed of this identity of issues in the two pending applications at p.6, fn. 4 of this Petition.

It is respectfully suggested that the petitions should be consolidated and that a writ of certiorari be granted in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon James H. Gill, Jr., Esq. and Daniel K. Rester, Esq., Camp, Carmouche, Barsh, Gray, Hoffman & Gill, Sixth Floor, 2431 South Acadian Thruway, Baton Rouge, La 70821; opposing counsel of record, by depositing a copy of same in the U.S. Mail, postage prepaid, this 27th day of February, 1987.

_____

Louis L. Robein, Jr.